

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM L. CHINN, SR.
Claimant

VS.

GOODYEAR TIRE & RUBBER COMPANY
Respondent

AND

**TRAVELERS INSURANCE/CONSTITUTION
STATE SERVICE COMPANY**
Insurance Carrier

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Docket No. 242,939

ORDER

Respondent and its insurance carrier appealed the November 17, 1999 Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument in Topeka, Kansas, on April 5, 2000.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for claimant. John A. Bausch of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a June 16, 1998 accident and resulting back injury. Averaging an 87 percent wage loss and a 50 percent task loss, the Judge found that claimant had a 68.5 percent permanent partial general disability.

Respondent and its insurance carrier contend Judge Benedict erred. They argue that claimant was disabled from working because of a preexisting heart condition rather than the back injury. Therefore, they argue claimant's disability benefits should be limited

to the functional impairment for the back. They also argue that claimant's award should be reduced by five percent for an alleged preexisting functional impairment to the back.

Conversely, claimant contends the Judge's decision is well supported by the evidence and should be affirmed.

The only issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. Should claimant's award be reduced by an amount for preexisting functional impairment?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On June 16, 1998, claimant injured his back while working for respondent in its maintenance department. The parties stipulated that the accident arose out of and in the course of employment with respondent.
2. Despite the accident, claimant continued to work through June 21, 1998, when he left work for a scheduled vacation. Claimant worked eight hours on June 17, 1998; eight hours on June 20, 1998; and 12 hours on June 21, 1998. While on vacation, claimant returned to his cardiologist, Dr. Francis Weyrens. Because of claimant's coronary artery disease, as early as May 1998 the doctor had told claimant to stop working. Claimant did not return to work for respondent after June 21, 1998, but applied for respondent's disability pension. Before deciding to pursue the disability pension, claimant never requested accommodation for his back.
3. On June 22, 1998, Dr. Weyrens prepared a disability pension application for claimant that was submitted to respondent to request a disability pension. In that document, the doctor indicated that claimant's severe coronary artery disease rendered him totally and permanently disabled from gainful employment as of May 19, 1998. The disability pension application was prepared before claimant received physical therapy or other medical treatment for his back and, therefore, before he had any knowledge of how he might recover from the June 1998 accident.
4. After the accident, claimant initially sought chiropractic treatment. Later, claimant underwent physical therapy and epidural injections. During treatment, claimant had an MRI that showed two protruding discs. Claimant's doctors considered back surgery, but the cardiologist recommended against it.

5. As indicated above, claimant had a history of heart disease before the June 1998 accident. In 1995, claimant had a heart attack and underwent bypass surgery. In November 1997, Dr. Weyrens hospitalized claimant for increasing shortness of breath. While hospitalized, claimant underwent a series of tests that showed severe coronary artery disease, occlusion of one of his five bypass grafts, and weakness of the heart muscle. He also underwent lung evaluation that showed moderate obstructive pulmonary disease. The series of tests indicated that claimant's coronary artery disease was progressing.

6. Dr. Weyrens next saw claimant in May 1998, at which time the doctor advised claimant to quit work. At that time, claimant was complaining of difficulties working because of shortness of breath with mild activity. In late May 1998, claimant had a treadmill stress test in which he did poorly and which the doctor considered to be markedly abnormal. At that time, Dr. Weyrens believed claimant was medically disabled from working.

7. According to Dr. Weyrens, in October 1998 claimant was experiencing marked shortness of breath from walking two or three minutes and was experiencing angina symptoms from mild activity and stress.

8. In April 1999, at his attorney's request, claimant saw Dr. Daniel Zimmerman for an evaluation and impairment rating. According to Dr. Zimmerman, claimant provided a history that his cardiologist took him off work because of his heart condition on either June 21 or June 22, 1998. Dr. Zimmerman found that claimant's back injury constituted a 21 percent whole body functional impairment according to the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment (Guides)*.

9. In January 1999, Dr. Phillip Baker examined claimant at the request of respondent and its insurance carrier. Dr. Baker determined that claimant's back injury constituted a 10 percent whole body functional impairment rating according to the *Guides*.

10. The Board finds that Dr. Zimmerman's and Dr. Baker's functional impairment ratings should be given equal weight. Averaging the ratings provided by Doctors Zimmerman and Baker, the Appeals Board finds that claimant has a 15.5 percent whole body functional impairment as a result of the back injury.

11. At the time of the September 1999 regular hearing, claimant was receiving a disability pension from respondent and Social Security disability benefits.

CONCLUSIONS OF LAW

1. The Award should be modified to reduce the permanent partial general disability to the 15.5 percent functional impairment rating.

2. The Appeals Board concludes that claimant left work and applied for disability pension benefits because of his deteriorating coronary artery disease. There is convincing evidence that claimant's heart condition was worsening and causing increased shortness of breath. Further, claimant had Dr. Weyrens complete the disability pension application before he underwent medical treatment for his back. Finally, claimant told Dr. Zimmerman that his cardiologist had taken him off work in June 1998 because of his heart condition. When considering the entire record, the Board concludes that it was claimant's heart condition that caused him to leave work.

3. Because a back injury is an "unscheduled" injury, the permanent partial general disability is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

4. Because claimant's inability to work was caused by the preexisting heart condition, the permanent partial general disability is limited to the 15.5 percent functional impairment rating.

5. The evidence fails to establish that before the June 1998 accident claimant had a condition in his back that would constitute an impairment for purposes of reducing the Award under K.S.A. 1997 Supp. 44-501(c). That statute was intended to prevent a worker from recovering benefits for a preexisting impairment. But, when a preexisting condition is neither known nor symptomatic nor disabling in any discernible manner, the condition does not constitute an impairment and the Award is not reduced. Therefore, the request by the respondent and its insurance carrier to reduce the Award for a preexisting functional impairment should be denied.

AWARD

WHEREFORE, the Appeals Board modifies the November 17, 1999 Award and reduces the permanent partial general disability to 15.5 percent.

William L. Chinn, Sr., is granted compensation from Goodyear Tire & Rubber Company and its insurance carrier for a June 16, 1998 accident and resulting disability. Based upon an average weekly wage of \$1,476.59, Mr. Chinn is entitled to receive 64.33 weeks of permanent partial general disability benefits at \$351 per week, or \$22,579.83, for a 15.5 percent permanent partial general disability, making a total award of \$22,579.83, which is all due and owing less any amounts previously paid.

The Appeals Board adopts the remaining orders contained in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
John A. Bausch, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director